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Mr. Bill Moore
Department of Ecology
Municipal Stormwater Permit Program
P.O. Box 47696
Olympia, Washington 98504-7696

Re: Comments on the Draft Phase 1 Municipal Stormwater NPDES General Permit

Dear Mr. Moore:

Below please find comments prepared by the Snohomish County Prosecuting Attorney's Office on the Draft Phase I Municipal Stormwater NPDES General Permit. These comments are in addition the County's comments sent to you by the Office of the Executive. We appreciate the opportunity to comment and look forward to discussing ways in which the permit can be clarified and improved.

Areas of Concern:

1. Special Condition S1.D.3. This section purports to require drainage, diking, flood control and diking and drainage districts to be covered as secondary permittees. However, it is unclear who would be covered based on the current definition. What does the phrase "serving non-agricultural land uses" means? Please provide more detail. In addition, there are several other types of special purpose districts dealing with flooding issues set forth within Title 85 RCW beyond those listed in the permit. Why are some of them excluded and others included?
2. Special Condition S2.C.
 - a. Only "emergency" firefighting exercises are covered under the draft permit. Thus, stormwater discharges from training exercises must be contained and treated. However, under the federal law, the Clean Water Act excludes all "firefighting activities" are from the definition of "illicit discharges" which presumably includes training activities. See 40 CFR

122.26(b)(2).¹ Pursuant to federal regulations, *all* firefighting discharges are covered under the permit unless “such discharges or flows are identified as significant sources of pollutants to waters of the United States. Ecology should similarly allow all firefighting activities to be covered by the permit, including training exercises.

- b. In deviating from the EPA standard, has Ecology established that discharges from firefighting training exercises are significant sources of pollutants? If so, scientific studies showing this to be the case should be referenced in the Fact Sheet, and made available for public review.
 - c. We are additionally concerned that there has been little, if any, outreach to local fire districts and fire departments about these new requirements and the need to comply with the upcoming permit. What has Ecology done to provide public outreach to these affected agencies?
3. Special Condition S2.A.4. This section may be problematic because it implies that any groundwater discharges that are hydraulically connected to stormwater must be in compliance with this permit. (See, Fact Sheet at p. 22).
- a. Has Ecology established that pollutants have been traced from the source to surface waters? If not, stormwater discharges to groundwater are not subject to this permit.
 - b. Please provide clarification about how municipalities would prohibit contaminated groundwater discharges to the municipal separate storm sewer systems (MS4s) if the pollution source is untraceable. Furthermore, the regulation groundwater is the province of the state, not local government. As such, local government maybe preempted from regulating in this area.
 - c. Moreover, if such pollutants are identified, Ecology must use the modification process in General Condition G14 to incorporate these requirements.
4. Special Condition S2.D- This section states that “this permit does not authorize any other illicit or non-stormwater discharges except.... , nor does it relieve entities responsible for illicit discharges....” Please clarify that this condition refers to the *discharger*, not the permittee responsible for identifying and stopping illicit discharges. As written, the permit language invites citizen suits against

¹ (2) Illicit discharge means any discharge to a municipal separate storm sewer that is not composed entirely of storm water except discharges pursuant to a NPDES permit (other than the NPDES permit for discharges from the municipal separate storm sewer) and discharges resulting from fire fighting activities.

municipalities because it appears to shift liability for illicit discharges to the permittee rather than the person or entity that caused the illegal discharge.

5. Special Condition S4.A. As written, S4A means that discharges causing or contributing to violations of water quality standards constitute a permit violation, even where a municipality is in compliance with all permit conditions, and employing all known available reasonable technology (AKART) to a discharge. This section should be deleted entirely because it purports to make MS4s subject to a state law provision applicable only to wastewater treatment systems. (See, RCW 90.48.520). Under the Clean Water Act (CWA), MS4s are not defined as treatment works and stormwater is not defined to mean wastewater. The requirements in RCW 90.48.520 do not belong in a general MS4 permit. As such, this section should be deleted.
6. Special Condition S4.E.- Section E states that: "In order to meet the goals of the CWA, to demonstrate compliance with S4.C and D (MEP and AKART), and make progress towards compliance with applicable surface water, ground water and sediment management standards, each permittee shall comply with the requirements of this permit." As written, it is ambiguous whether all sections of the permit are viewed as "requirements" by Ecology. However, the fact sheets states that compliance with the stormwater management program constitutes compliance with the permit. Thus, this section should be revised to state as such. (See, Fact Sheet at p. 27).
7. Special Conditions S5. A and S5.A.1. This section purports to include "applicable TMDLs" as part of the stormwater management plans. This is problematic because the permit's definition of "applicable TMDLs" includes TMDLs adopted *after* issuance of the permit but prior to the date that the permittee's application is received by Ecology. Ecology must clarify here that such TMDLs may be incorporated as permit conditions or requirements only after Ecology makes a permit modification or adopts an administrative order.
8. Special Condition S5. C.1.b.i.-iv. These provisions require municipalities to "control the contribution of pollutants to municipal separate storm sewers... to prohibit illicit discharge to the municipal separate storm sewer owned or operated by the permittee... control the discharged of spills and the dumping or disposal of materials other than stormwater.... Control through interagency agreements among co-applicants, the contribution of pollutants from portions of the system to another..." While municipalities can regulate others, such municipalities cannot control or guarantee outcomes. As written, the condition is unreasonable in that it assumes that municipalities can guarantee outcomes. This condition should be changed to reflect this fact.
9. Special Condition S5.c.5.a. This condition states that the SWMP "shall include a program to prevent and control the impacts of runoff..." The federal regulations

do not require prevention of runoff but instead, require permittees to “develop, implement and enforce controls to reduce the discharge of pollutants.” 40 CFR part 122.26(d)(2)(iv)(a)(2) and (D). This condition which requires a SWMP program to prevent and control the impacts of runoff also appears to be a different standard than what is required by Ch. 90.48 RCW (“to prevent and control pollution of the waters of the state.”) This requirement is inconsistent with goals of NPDES and the State's Water Pollution Control Act. As such, this condition should be changed to more closely comply with federal and state laws and regulations.

10. Special Condition S5.C.5.b.1.

- a. In general, this section is vague and ambiguous because it fails to state when a municipality will be in compliance with the permit. This section must be revised to state explicitly when a municipality is or is not in compliance with the terms of the permit.
- b. The last sentence of this condition (i) is also vague and ambiguous and must be revised. Ecology fails to provide any detail about a process that involves more stringent requirements. Please provide additional detail.

11. Special Condition S5.C.5.b.iv.(3)- This section states that in cases of circumstances beyond the permittee's control that may result in non-compliance with the requirements of this section, Ecology may grant an extension. As written, this condition could result in a permittee's non-compliance through no fault of their own. When or why would Ecology not grant an extension? What criteria will Ecology use to make this determination? Ecology should modify this condition to state that it shall grant an extension or clarify when/what criteria Ecology will rely on in making this determination.

12. Special Condition S5.C.5.b.v.- This conditions states that the program must establish legal authority to inspect private stormwater facilities and enforce maintenance standards. As you know, municipalities do not have the legal authority to inspect private stormwater facilities, absent permission of the landowner or the issuance of a search warrant based on probable cause that a *crime* has occurred. (See, e.g., McCready v. City of Seattle cases). Even though subsection C of this condition states generally that this condition must be implemented within the limits of state and federal law, permittees would strongly encourage this recognition to be explicitly stated in subsection (v). Accordingly, this condition should be changed to add the phrase “...within the limits of federal and state law.”

13. Special Condition S5.C.5.b.vi.- This condition requires review, inspection and enforcement programs that use “qualified personnel.” Although the terms are defined in the permit, this condition is still vague. Does in-house training constitute professional training? If not, what does? Please clarify what will qualify as acceptable “professional training.”

14. Special Condition S5.C.5.b.vi.(1)-(7). In this section, Ecology expects the permittee to inspect projects at least 3 times, and to actually inspect 95% of all sites or face noncompliance with the terms of the permit. Snohomish County comprises over 2,000 square miles of land, and the County receives thousands of development applications each year. Meeting these new inspection requirements at the frequencies specified in the draft permit render the permit unreasonable from both a manpower and budget standpoint and constitutes an unfunded state mandate, violating state law.
15. Special Condition S5.C.6 This section requires a program to construct structural stormwater controls that “shall address impacts that are not adequately controlled by the other required actions of the SWMP, and shall provide proposed projects and an implementation schedule.” As stated in the fact sheet, Ecology recognizes that it is infeasible for such controls to be considered or used on all existing development and that permittees are expected to address the “highest-ranked problems subject to the limitation of available resources.” This special condition is unconstitutionally vague as to what is required for compliance with the permit. As such, the permit conditions should be stricken or significantly revised to clarify what is required of permittees. The conditions should be further clarified to define terms such as “highest-ranking problems” and what the time frames are for achieving such structural controls.
16. Special Condition S5.C.6.a.
 - a. If this section is intended to apply to capital facilities, it should be revised.
 - b. Further, this section provides that the use of in-stream culvert replacement projects does not comply with the terms of the permit. Why not?
17. Special Condition S5.C.7.a.iii. This condition attempts to limit protection to permittees who violate water quality standards only if permittees are in compliance with the terms of the permit for water quality violations AND such violations are caused by industries covered under an NPDES permit issued by Ecology. This condition is unreasonable and expects that municipalities can force all dischargers to obtain coverage under an NPDES permit issued by Ecology. Strike or revise this condition to reflect compliance based on factors within a municipalities control.
18. Special Condition S5.C.7.b.i. – This section refers permittees to Appendix 3 to identify pollutant generating sources. However, Appendix 3 is the annual report form for permittees. Please clarify.
19. Special Condition S5.C.7.b.iii.(2). This section requires permittees to inspect 100% of sites identified through legitimate complaints. However, it is possible that the property owner will deny the permittee permission to enter the site or there is no legal authority to inspect the site. Ecology should modify this condition to

recognize that in limited circumstances, the permittee may be unable to inspect 100% of sites.

20. Special Condition S5.C.8. This provision requires Permittees to ensure all types of illicit discharges are prohibited.
 - a. Such a sweeping regulatory requirement may go beyond the legal authority of local governments and may also cover discharges that are not covered under this permit. This section should be revised to more narrowly list the set of stormwater discharges that permittees are required to regulate.
 - b. What constitutes "appropriate" control measures? Ecology should create a list of appropriate measures before the permit is effective or remove or modify this condition.
21. Special Condition S5.C.8.b.iii- iv. Ecology requires that permittees develop and implement an ongoing training program no later than 24 months after the effective date of this permit. However, subsection (iii) requires that no later than 18 months after the effective date of the permit, each permittee shall ensure that all municipal field staff who are responsible for any part of illicit discharges must be trained to conduct these activities. As currently drafted, these timelines do not make sense. It makes more sense for the deadline to develop a program to train staff to occur earlier than the deadline to ensure that staff are trained. As such, we suggest that DOE reverse the deadlines for subsections (iii) and (iv).
22. Special Condition S5.C.8.vii.(2). This condition requires the illicit discharge to be eliminated within 6 months.
 - a. First, this condition is ambiguous and should be clarified to state that the discharger is responsible for eliminating the illicit discharge.
 - b. Second, the County is willing to pursue enforcement, but may not be able to ensure termination within 6 months.
 - c. While the fact sheet states that this timeframe is based on experience of Ecology field staff in conducting similar enforcement actions; in the County's experience the timeframe may be longer before the illicit discharge is terminated. Extend the deadline or provide some exemption for limited circumstances where a municipality is working in good faith to eliminate the discharge but has not yet been successful.
23. Special Condition S5.C.8.viii.
 - a. This provision requires Permittees to ensure all types of illicit discharges are prohibited. This requirement may seek actions on the part of municipalities that are outside the scope of their authority and cover subject matters not covered under this permit. (For example, polluted groundwater is regulated by the Department of Ecology under state law. Other than protecting critical aquifer recharge areas under GMA, local

governments are likely preempted from regulating ground water quality which flows into an MS4. Groundwater discharges are not generally covered by this stormwater permit). As such, the permit condition should be changed to reflect the scope of the permittees legal authority to regulate.

- b. Finally, what constitutes "appropriate" control measures? Ecology should create a list of appropriate measures before the permit is effective or remove or modify this condition.
24. Special Condition S5.C.9.b.ii. All of the requirements under the inspection requirement will require a significant increase in staff to develop an inspection schedule system and to implement such system to ensure 95% inspection rate of all treatment and flow control facilities. This rate is onerous. What basis is there to require this standard? Why did Ecology select 95% as opposed to 100% or 90%? See e.g., SC S5.C.9.ii.(5); SC S5.C.9.iii.(3).
 25. Special Condition S5.C.9.b.ii.(1)-(2). This inspection requirement will require a significant increase in staff to inspect and report on all treatment and flow control facilities. Moreover, this condition does not provide any exception for inspection on private property where permission is not granted by the land owner. Ecology must modify the condition to allow inspections only to the extent allowed by law.
 26. Special Condition S5.C.9.b.ii.(3). This condition requires permittees to develop an ongoing inspection schedule for annual inspection of all stormwater treatment and flow control facilities (other than catch basins) after the initial schedule. This condition is yet another inspection requirement that requires multiple site visits over a several year period. It is unclear what this provision is intended to do.
 27. Special Condition S5.C.9.b.ii.6. This condition requires permittees to begin implementing a program to inspect all permanent stormwater treatment and flow control facilities (other can catch basins) annually. See comment for S5.C.9.ii. (above).
 28. Special Condition S5.C.9.b.v-ix. These conditions require records of inspection and maintenance and repair activities and require policies and procedures to reduce pollutants in discharges from lands owned or maintained by the permittee. These conditions are vague (e.g., what type of "practices?" Reduce what "impacts?" To what level? How is compliance with this condition measured? Does the Tri-County take limit meet the test?
 29. Special condition S5.C.10. This section of the permit attempts to outline an education and outreach program. However, this section is vague and ambiguous.
 - a. How does one measure "awareness of natural yard care techniques"?

- b. What constitutes the “general public”?
 - c. Does Ecology intend municipalities to measure based on numbers of people or percentages? [The Fact Sheet states that “permittees must implement a public education program to reduce or eliminate behaviors and practices that cause or contribute to adverse impacts of stormwater discharges on water bodies.... The minimum measures require that permittees...must target all listed audiences no later than one year after the effective date of the permit; measurable improvements in each target audience’s understanding of the problem and what they can do to solve it; measurable improvements in the percentage of each target audience regularly carrying out the indeed action or behavior change].
 - d. This requirement will require significant resources to make these measurements in an area that is outside of municipalities’ expertise. This appears to be an unfunded mandate that Ecology should conduct or provide funding for municipalities to complete.
 - e. Finally, municipalities cannot control the “reduc[tion] or eliminate[ion of] behaviors and practices that cause or contribute to adverse impacts of stormwater discharges on water bodies. This condition should be changed to reflect this fact.
30. Special Condition S6.B. This section involves coordination among permittees and provides “where relevant and appropriate, the SWMP shall also include coordination among departments of the Secondary Permittee to ensure compliance with the terms of this permit.” When is coordination among departments “relevant” and “appropriate”? How will permittee know when these conditions are present and thus, become a permit condition? Will permittees receive notice of when coordination is relevant and appropriate? DOE should modify this condition to answer these questions.
31. Special Condition S6.B.1. This condition requests each secondary permittee to be able to demonstrate their ability to control the contribution of pollutants associated with industrial activity. This provision appears to be an impermissible attempt on the part of Ecology to shift its permit administration responsibilities and liability of permittees under the NDPES Industrial Stormwater General Permit program to municipalities. This provision should be modified or stricken.
32. Special Condition S6.C.6. This section requires secondary permittees to demonstrate they have the ability to carry out inspections, surveillance, and monitoring procedures to determine compliance with permit conditions. However, the condition fails to provide any specific guidance as to what actions need to be taken to achieve permit compliance. As such, the provision may be unconstitutionally vague. Permittees should not have to guess as to whether a

certain level of effort is enough; the permit should provide clear guidance as to what DOE will accept as compliance for this condition.

33. Special Condition S6.F.3. This section provides permit conditions regarding illicit discharge detection and elimination. Many drainage districts do not have the expertise to conduct spill response, nor the authority to do this. Modify or delete this provision.

34. Special Condition S7 (intro paragraph) In this section, the permit states, “the following requirements apply if an applicable TMDL is has been approved as of the permit's effective date for stormwater discharges from MS4s owned or operated by the permit.” The permit goes on to state, “Applicable TMDLs which have been approved by EPA on or before the issuance date of this permit, *or TMDLs which have been approved by EPA prior to the date that the permittees application is received by Ecology* . All permittees must be in compliance with applicable TMDL requirements.”

a. What does the italicized portion of the condition mean? As written, this sentence could be interpreted to require compliance with later-enacted TMDLs (see e.g., Appendix 2 at p. 14). The italicized portion of the sentence should be modified or stricken.

b. Further, Appendix B of the Fact Sheet identifies all “applicable TMDLs” and contains a different set of TMDLs than those TMDLs listed in Appendix 2 of the Permit. Please clarify this.

c. Finally, the Fact Sheet at pp. 47- 48 provides:

“For TMDLs that are approved by EPA after the permit is issued, Ecology may establish TMDL-related permit requirements through a formal permit modification or through issuance of an administrative order. Ecology’s decision to enforce requirements of TMDLs completed after the issuance of the permit will be based on the determination that implementation of actions, monitoring or reporting necessary to demonstrate reasonable further progress toward achieving TMDL waste load allocations. and other targets, are not occurring and must be implemented during the terms of this permit.” Snohomish County requests that this acknowledgement be inserted into the permit.

35. Special Condition S7.A. Same comment as immediately above. In order to remove ambiguity, please clarify in this condition that a municipality must comply with those TMDLs adopted at the time of permit issuance, and compliance with any other later-adopted TMDLs may only be required after Ecology goes through the permit modification process or issues an administrative order.

36. Special Condition S7.B. This permit condition provides the following: “For applicable TMDLs not listed in appendix 2, compliance with this permit shall constitute compliance with those TMDLs.” This condition also requires that each permittee “shall keep records of all actions required by this permit that are relevant to applicable TMDLs within their jurisdiction.” Ecology defines “applicable TMDLs” as “a TMDL which has been approved by EPA on or before the issuance date of this permit, *or prior to the date that the permittee’s application is received by Ecology*, or prior to a modification of this permit, whichever is later.” (See Draft Permit at p. 53).

- a. It appears that the italicized section of the permit requires permittees to “keep records” of information from later-enacted TMDLs without requiring a permit modification. Revise this section and definition to clarify that permittees must comply with TMDLs that are adopted at the permit’s effective date. Other, later-enacted TMDLs are only applicable to this permit through a permit modification or issuance of an administrative order.
- b. Moreover, it appears as though this condition shifts the burden from federal (or as delegated to the state) authority to local municipalities to implement TMDL monitoring Quality Assurance Project Plans (QAPP). This appears to be an unfunded state mandate.
- c. In addition, the submittal timeline is too short.
- d. Finally, it appears that this condition requires Permittees to develop new QAPPs, rather than allowing Permittees to submit existing QAPP documents. Why is Ecology requiring municipalities to create a new QAPP when an existing QAPP will provide the information Ecology needs?

37. Special Condition S8. Monitoring.

- a. What is the basis for Ecology requiring monitoring for so many constituents/parameters? This requirement appears to be an impermissible attempt on the part of Ecology to require local government permittees to perform basic monitoring that is the purview of the State. The requirements appear to go way beyond that which is required to ensure that permittees are meeting the requirements of state and federal law. As such, the condition appears to be an unfunded state mandate in violation of state law.
- b. Is a “qualifying storm” one that meets all of the criteria detailed in S8.A.2.(i)-(ii)?
- c. What is Ecology’s basis for requiring sampling of 75% of the qualifying storms?

- d. S8.B states that chemicals that are below detection limits after two years of date may be dropped from the analysis. What are the "detection limits" for the chemicals listed at S8.A.2.b-e?
38. Special Condition S9. This section as written provides no certainty for permittees. Ecology must commit to review the report and to identify any deficiencies or request clarifications within a set timeframe (e.g. 60-90 days). Ecology's failure to comment on a report within the timeframe should result in a presumption of compliance.
39. Special Condition S9.b.1. This condition requires permittees to report on the status of compliance with the conditions of the permit. In addition, the condition provides that if permit deadlines are not met, permittees shall report the reason why the requirement was not met. This condition appears to require permittees to make a subjective determination about their own compliance and impermissibly attempts to shift the burden of determining permit compliance or noncompliance from the Department of Ecology to permittees.
40. General Condition G3. What is meant by the use of the term "knowledge?" Is it actual notice, inquiry notice, or some other type of knowledge? Is every employee of a municipality obligated to inform Ecology of a spill or only those with appropriate training? Please provide additional detail to clarify this condition.
41. General Condition G5.B. This provision needs an exemption for records of attorney-client privilege or work product material.
42. General condition G6. This general condition is vague in that one cannot tell whether permit compliance constitutes compliance with this condition?
43. General Condition G9.G. Ecology must use the permit modification process to impose additional monitoring requirements. This general condition should be deleted.
44. General Condition G12.A. The threshold is too low for revocation. At a minimum, Ecology should include notice, an opportunity to explain or cure, except for willful violations or bad faith.
45. General Condition G12.C. The County believes that this is not applicable to this permit, since Permittees are allowed to discharge.
46. General Condition G13. What are the triggers for this? The triggers should be included in the general permit.

47. General Condition G14C. It is unclear why the approval of a water quality management plan would trigger modification and/or revocation of the general permit. What statute authorizes this?
48. General Condition G14D. It is unclear whether additional information which indicates that cumulative effects are unacceptable may trigger permit modification. Please clarify.
49. General condition G16.B. What is the legal authority cited to by the State for limiting the legal effect of an appeal to the individual discharger?

We trust that these comments will be of assistance to you. Please do not hesitate to contact us if you have any questions or comments.

Very truly yours,

Millie M. Judge
Assistant Chief Civil Deputy
Land Use & Environmental Law Unit

cc: County Council
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